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No. 93-281

In The Supreme Court of the United States

October Term, 1993

Derrick Dale Fontroy,
Petitioner

V.

David S. Owens,
Irene J. Pernsley,
Gaetano Curione,
and Harry Moore,
Respondents

BRIEF OF RESPONDENTS OWENS, PERNSLEY, CURIONE AND MOORE, IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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COUNTER-STATEMENT OF THE CASE

Whatever clarification of Petitioner's Statement of the Case is necessary appears in the Respondents' argument below. We note only that the Petitioner's complaints of inadequate discovery (Petitioner for Certiorari at p. 9 n. 12) were brought to the trial court's attention, giving Petitioner the full opportunity to compel any necessary discovery.

ARGUMENT

I. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE QUESTION WHETHER PETITIONER HAS STATED A CAUSE OF ACTION FOR INVOLUNTARY EXPOSURE TO ASBESTOS.

A. The Question Of Whether Involuntary Exposure Of A Prisoner To Asbestos States An Eighth Amendment Claim Absent Present Injury Is Not Properly Presented For Review Before This Court.

Petitioner asks this Court to decide whether an inmate's involuntary exposure to asbestos while in prison is actionable under the Eighth Amendment even though he has not sustained any present injury from the exposure. This question is not properly presented for review before this Court.

The basic rule is that in cases originating in the federal courts, certiorari will not be granted where an issue is neither "pressed or passed upon" in the courts below, except in "exceptional cases." *Duignan v. United States*, 274 U.S. 195, 200 (1927). See also, *United States v. Lovasco*, 431 U.S. 783, 788 n. 7 (1977). Although the rule is prudential rather than jurisdictional in cases arising from federal courts, *Carlson v. Green*, 446 U.S. 14, 17 n. 2 (1980), there are no exceptional circumstances to justify granting certiorari in this case.[1] *U.S. v. Williams*, 112 S.Ct. 1735 (1992), recently held that "this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon ..." 112 S.Ct. at 1738-1739. But the question which Petitioner Fontroy now urges this Court to review was neither

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1. In cases involving certiorari to state courts, the rule may be jurisdictional because of federalism concerns, although the question does not appear to be settled. *Yee v. City of Escondido*, 503 U.S. ___, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153, 169 (1992). See also, *Illinois v. Gates*, 462 U.S. 213, 221-222, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

presented to nor passed upon by the District Court, and was certainly not passed upon by the Court of Appeals.

There is no claim for exposure to asbestos in the body of Petitioner's original *pro se* Complaint. Attached to the Complaint, however, was an exhibit entitled "Stipulation and Agreement" (A-24 through A-39), which contains the following sentence:

> Even worse is the fact, we are completely surrounded by ASBESTOS. Under the law this was to be removed sometime ago, as it is a known CANCER causing agent.

(A-37.) (emphasis in original)

This was the only statement anywhere in the initial pleading which mentioned asbestos, and Petitioner concedes that this so-called "Stipulation and Agreement" was not a stipulation at all, but merely a statement by the Plaintiffs. (Petition for Certiorari, p. 3 n. 4.)

In its ruling under 28 U.S.C. §1915(d), the District Court on April 28, 1987 dismissed some claims and allowed the Plaintiffs to proceed with their remaining claims including, inter alia, the claims concerning cell conditions.[2] (A-47, 48.) This arguably included the asbestos exposure claim.

The Complaint was served on Defendants, who moved to dismiss under Fed. R. Civ. P. 12(b)(6). On June 9, 1987, prior to any decision on the Motion to Dismiss, Fontroy filed an Amended Complaint which entirely omitted all mention of asbestos, (A-51-55.)

On April 21, 1988, the District Court granted in part and denied in part the Motion to Dismiss. (A-62-64.) With respect to the asbestos claim, the Court wrote:

---

2. The original Complaint seems to have included other unnamed plaintiffs as well as Fontroy.

> "2. Plaintiffs' allegation of asbestos problems in their cells states an eighth amendment claim. Dangerous exposure to asbestos caused by defendant's deliberate indifference could deprive inmates of the minimal civilized measure of life's necessities, i.e., habitable shelter. Such a deprivation could violate the eighth amendment"

(A-63.)

As written, this ruling seems not to depend on any allegation of present harm, and so arguably could be said to have decided in Fontroy's favor the exact question which he now asks this Court to review: whether involuntary exposure of a prisoner to asbestos states a cause of action even without evidence of present harm.

But thereafter, Fontroy never again presented or argued this issue to the District Court. After securing counsel, Petitioner filed a Second Amended Complaint, in which he was the only plaintiff, and changed his asbestos exposure claim to specifically include an allegation of present harm caused by the exposure. (A-69, Paragraph 16, Second Amended Complaint.) Even more importantly, in his Response to Defendants' Motion for Summary Judgment, Fontroy did not argue that he had a cause of action for involuntary exposure despite the absence of present harm. On the contrary, his entire defense to the Summary Judgment Motion was an attempt to show that he was physically injured. Fontroy's Memorandum of Law in Opposition to Summary Judgment is direct and explicit on this point. After citing several cases which held that asbestos exposure was not *per se* actionable,[3] Petitioner states:

> Assuming that these cases hold that a civil rights plaintiff cannot prevail on a claim of mere exposure

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3. *Jones v. Owens*, 1990 WL 121193 (E.D. Pa.), *Gonzalez v. Lyons*, 1989 WL 66386 (E.D. Pa.), *Nester v. Meese*, (M.D. Pa. October 29, 1987).

> to asbestos, this case is distinguishable. Plaintiff here claims an injury; a claim which Defendants have not disproved.

(A-117.)

Furthermore, in Footnote 3 of his Memorandum of Law, Fontroy expressly adopts the exact statement of the law which he now argues is incorrect:

> "Contrary to Defendants' broad interpretation, Plaintiff asserts that these cases [*Jones*, *Gonzalez* and *Nester*] stand for the narrow proposition that prisoner lawsuits based on the 8th Amendment will not be permitted when there is mere exposure to asbestos. Thus there can be no judicial remedy for the enhanced risk of future harm from mere exposure, but a litigant could recover if the exposure results in the manifestation of physical injury."

(A-117.)

Plaintiff Fontroy nowhere argued before the District Court that the cases cited by Defendants (*Jones*, *Gonzalez* and *Nester*) were not the law, or that a different legal principle should apply. Instead, Fontroy completely abandoned the claim which he arguably made in his original Complaint that exposure was *per se* actionable, and opposed summary judgment solely on the ground that he had symptoms of physical injury. He sought to present evidence of present injury, and the District Court allowed him the opportunity to do so. Indeed, because there was some uncertainty about the results of the diagnostic testing, the Court vacated the relevant portion of its May 2, 1991 Order to allow additional X-rays of Fontroy's lungs. (A-141 through A-143.) The X-rays were all negative, and summary judgment was entered for the Defendants.

It is therefore clear that the issue which Petitioner now seeks to present before this Court was not pressed upon the District Court, nor was it the basis of that Court's decision.

The District Court entered summary judgment against Petitioner on the basis of the legal theory presented by both parties and the evidence which counsel for Fontroy admitted was critical under that theory, i.e., symptoms of present injury. Petitioner's original Complaint may have claimed that mere exposure is actionable. But Fontroy twice amended his Complaint, changed his theory of the case, and never again argued to the District Court the *per se* actionability of asbestos exposure.

On appeal to the Third Circuit, Petitioner sought to present the question which he now asks this Court to review. See, Appellant's Brief to the U.S. Court of Appeals for the Third Circuit, p. 1. The Court of Appeals affirmed the District Court in a Judgment Order without any opinion. Third Circuit Internal Operating Procedures, Rule 6.1. It is therefore impossible to say that the Court of Appeals considered or decided the question presented here for review. The affirmance might well have been based on the conclusion that Fontroy waived or abandoned the issue in the District Court, which would have constituted an entirely proper basis for affirmance. *Brenner v. Local 514, United Brotherhood of Carpenters*, 927 F.2d 1283, 1298 (3d Cir. 1991). In any event, absent an opinion from the Court of Appeals, this Court should not deviate from the usual rule that certiorari will not be granted where an issue is neither "pressed or passed upon" in the courts below.

Finally, it cannot be argued that this Court's decision in *Helling v. McKinney*, ___ U.S. ___, 113 S.Ct. 2475 (1993) changed the law so that Petitioner should be allowed to resurrect his claim that a cause of action exists despite the absence of present physical injury. In his Petition for Certiorari (pp 16-17) Petitioner argues that *Webster v. Sowders*, 846 F.2d 1032 (6th Cir. 1988), *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990) and *Rice v. North Carolina Dept. of Corrections*, 873 F.2d 1440 (table; text in Westlaw) (4th Cir. 1989) had allowed Eighth Amendment asbestos exposure claims to proceed despite the absence of present injury. All of these decisions

were reported before Fontroy's Response to Defendants' Motion for Summary Judgment, and could certainly have been argued at that time. (Indeed, *Webster* was decided before Petitioner's Second Amended Complaint was filed). The cases which hold that mere exposure is not actionable are from other District Courts and were not binding upon the trial court. *Jones v. Owens*, 1990 WL 121193 (E.D. Pa.), *Gonzalez v. Lyons*, 1989 WL 66386 (E.D. Pa.), *Nester v. Meese*, (M.D. Pa. October 29, 1987). Petitioner had full and fair opportunity to argue that no proof of present injury was required to state a claim, and he deliberately chose not to press this argument. He made a tactical decision to stake his claim on evidence of present injury, and failed in his proof. The District Court and the Court of Appeals correctly decided the claim which Fontroy presented to them.

B. The Court Of Appeals Decision Was Entirely Correct And Does Not Conflict With *Helling v. McKinney*, 113 S.Ct. 2475 (1993), Or With The Decisions Of Other Circuits.

Because the Court of Appeals wrote no opinion, it is impossible to know the reason why it affirmed the District Court. It is therefore complete speculation for Petitioner to assert that the Third Circuit's decision conflicts with *Helling v. McKinney*, 113 S.Ct. 2475 (1993), or with decisions of other circuits on the actionability of asbestos exposure claims under the Eighth Amendment. There are clear grounds for affirmance which in no way conflict with existing case law.

One such ground is waiver. As argued above, in the District Court Petitioner abandoned his argument that proof of present injury is unnecessary to state a claim. He did not, as he could have, argue in the alternative that evidence of present injury was unnecessary but nonetheless was present in his case. Instead, he expressly assumed, in his Memorandum of Law Opposing Summary Judgment, that the law required proof of present harm, and then tried to develop evidence of such harm. (A-117) It bears repeating that at this point

Fontroy was represented by counsel. The Third Circuit could easily have affirmed on the basis that he waived his argument that exposure to asbestos was *per se* actionable. Affirmance based on waiver obviously would not conflict with *Helling*, *Webster*, *Rice* or *Powell*.

There is a second sound reason for the Court of Appeals' affirmance of the District Court's judgment. In answering Defendants' Motion for Summary Judgment, Fontroy failed to provide any evidence that he was exposed to asbestos while in the Philadelphia prisons. The allegation of exposure was denied in Defendants' Answer to Plaintiff's Second Amended Complaint. Lack of exposure was specifically raised as one of the grounds for Summary Judgment. (A-90.) Plaintiff would clearly have had the burden of proving exposure at trial, and therefore had the burden of demonstrating that a genuine issue of fact existed on this point. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Third Circuit might well have affirmed because of Fontroy's utter failure, after four and one half years of litigation, to come forward with even a scintilla of evidence of exposure to asbestos. Fontroy produced no depositions, admissions, answers to interrogatories or affidavits stating that he was in fact exposed to asbestos, but instead relied on the allegations of his Second Amended Complaint. On this ground alone summary judgment for Defendants was proper.

II. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE COURT OF APPEALS JUDGMENT WITH RESPECT TO PETITIONER'S EQUAL PROTECTION CLAIM.

Petitioner's equal protection claim is based on alleged differences in treatment between protective custody inmates and general population inmates with respect to various goods and services available in prison. Despite his disclaimer (Petition for Certiorari, pp. 18-19), Fontroy's argument amounts to the claim that protective custody inmates are entitled to re-

ceive identical treatment with respect to each of these items. The argument is incorrect as a matter of law, and is refuted by the very allegations of Fontroy's own pleading. Accordingly, the decisions of the courts below were entire correct.

Petitioner's original Complaint admitted that:

> P.C. [protective custody] inmates are in protective custody because they fear for their lives and/or personal safety or because they can't get along with their fellow inmates in general [sic] population or for all the aforementioned reasons.

(A-25.)

The Complaint itself admits that protective custody inmates are security risks. They are likely to be either aggressors or victims, and cannot be allowed to mix freely with the general population. The demand for absolute equality of treatment would eliminate the discretion given to prison authorities to control matters of prison administration, including conditions of confinement. *Bell v. Wolfish*, 441 U.S. 520 (1979); *Turner v. Safley*, 482 U.S. 78 (1987). *Green v. McKaskle*, 788 F.2d 1116 (5th Cir. 1986), cited by Petitioner, plainly states that differences in treatment must be substantial before an equal protection violation is found.

Despite counsel's attempt to dress up the equal protection claim on appeal, Fontroy's pleadings show this claim to be plainly frivolous, which is exactly what the District Court found. For example, with respect to jobs within the prison, Fontroy's Complaint, while admitting that jobs are actually available for protective custody inmates, consists of suggestions about when and where these inmates should be allowed to work, and what their compensation should be. (A-26.) The allegations concerning education do not come close to alleging substantial differences in treatment. They are just a "wish list" of three educational programs in which Fontroy would like to participate. There is no allegation that equivalent substitutes are unavailable. (A-31-32, A-54.) The allegations concerning telephone, television, tobacco and religious services

all fail to set forth constitutionally cognizable differences in treatment. The differences which do exist are so minor as to plainly be within the discretion of prison authorities to impose.

Petitioner states: "The District Court should have evaluated and compared the differences in treatment between protective custody and general population inmates." (Petition for Certiorari, p. 23) The Court's evaluation was thorough, and took into consideration the discretion of prison authorities, the insubstantial nature of most of Fontroy's claims, the legitimate penological differences between the two population groups and the nature of the different treatment accorded them. The resulting decision was entirely correct.

III. CERTIORARI SHOULD NOT BE GRANTED WITH RESPECT TO THE JUDGMENT OF THE LOWER COURTS ON THE INADEQUATE SECURITY CLAIM.

A. In Ruling On Respondents' Motion For Summary Judgment, The District Court Was Not Bound By The Doctrine Of Law Of The Case, And Was Free To Reexamine Its Earlier Decision On The Inadequate Security Claim.

Petitioner does not directly challenge the correctness of the District Court's decision that the Second Amended Complaint did not state a claim for inadequate security. That precise issue forms no part of the Petition for Certiorari. Instead, what is presented is the narrow question of whether in the procedural posture of this case the District Court was free to reexamine its previous denial of the relevant part of Respondents' Motion to Dismiss. Petitioner asserts that the trial court was bound by the doctrine of law of the case when it decided the claim of inadequate security in the context of the Motion for Summary Judgment.

The term "law of the case" encompasses four different areas of procedural practice in the lower courts. Those four areas are: (1) where a lower court adheres to its own prior

ruling in the same case; (2) where a lower court is bound by the decisions and rulings of a higher court within a single judicial system; (3) where one judge defers to the rulings of another judge of the same court in the same case; and (4) where a party fails to appeal an issue or preserve it for review. Wright, Miller and Cooper, Federal Practice and Procedure, Vol. 18, Jurisdiction, Ch. 13 §4478 at p. 788. The version of law of the case applicable in the present situation is that stated in (1), above, where a lower court adheres to its own prior ruling in the same case. However, when this version of law of the case applies to a given situation, it is only a rule of practice, not absolutely final and binding on the court.

As Wright, Miller and Cooper state: "Although courts are often eager to avoid reconsideration of questions once decided in the same proceeding, it is clear that all federal courts retain power to reconsider if they wish." *Id.* In *Messenger v. Anderson*, 225 U.S. 436 (1912), this court stated that "In the absence of statute, the phrase 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Id.* at 444 (citations omitted). Grounds that may justify reexamination of a decision include intervening change of controlling law, availability of new evidence, or the need to correct clear error or to prevent manifest injustice. Wright, Miller & Cooper, Federal Practice and Procedure, Vol. 18, Jurisdiction, Ch. 13 §4478 at p. 790. Moreover, Fed. R. Civ. P. 54(b) expressly acknowledges and permits a trial court to reconsider an earlier decision:

> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties**
>
> . . .
>
> In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all of the parties shall not terminate the action as to

> any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(emphasis added).

The cases which Petitioner cites in support of his argument invariably note that law of the case is a discretionary doctrine, and not a limit to the tribunal's power. *Arizona v. California*, 469 U.S. 605, 618 (1983); *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988), citing *Messenger*, 225 U.S. at 1156; *New York State National Organization for Women v. Terry*, 961 F.2d 390, 395-396 (1992); *Redfield v. Continental Gas Co.*, 818 F.2d 596, 605 (7th Cir. 1987); *Little Earth of the United Tribes v. United States Department of Housing and Urban Development*, 807 F.2d 1443, 1440 (8th Cir. 1986).

Moreover, most cases cited by Petitioner do not involve the particular application of law of the case which the District Court allegedly "violated" here. *Christianson v. Colt Industrial Operating Corp.*, 486 U.S. 800, 817 (1988) (Court of Appeals for the Seventh Court revisited issue already examined in case transferred from Court of Appeals for the Federal Circuit); *Redfield v. Continental Gas Co.*, 818 F.2d 596 (7th Cir. 1987) (Question whether prior state court ruling in same case was binding on Federal Bankruptcy Court); *Little Earth of the United Tribes v. United States Department of Housing and Urban Development*, 807 F.2d 1443, 1440 (8th Cir. 1986) (After passage of two years time, Appellant sought reconsideration in Court of Appeals of issue decided in District Court, but from which no appeal was taken); *A. & A. Concrete v. White Mountain Tribe*, 781 F.2d 1411 (9th Cir. 1986) (Court held inapposite Appellants' attempt to apply as law of the case District Court's decision from a previous unrelated case); *Gage v. General Motors*, 796 F.2d 345 (10th Cir. 1986) (Federal court reviewed issues previously determined by state court tribunal); *Commercial Union of America v. Anglo-South Amer-*

ican Bank, 10 F.2d 937 (1925) ("Judges of coordinate jurisdiction sitting in the same court and the same case, should not overrule the decisions of each other" *Id.*, at 941.)

The case of *Wyoming v. Oklahoma*, 502 U.S. ___, 112 S.Ct. 789, 117 L.Ed. 2d 1 (1992) actually supports Respondents' position here, that the District Court was free to reexamine its earlier decision. In *Wyoming*, a case brought under the original jurisdiction of this Court, Defendant State of Oklahoma took exception to a Special Master's recommendation that Plaintiff had standing to sue. The Court refused to accept Defendant's position, and noted that it had twice rejected the argument earlier in the litigation. But the Court expressly stated that its decision was based on the lack of merit of Defendant's argument, not on any absolute bar to reconsideration of the earlier decisions:

> "In each brief submitted on the issue, Oklahoma has recited the same facts, cited the same cases, and constructed the same arguments. Of course, we surely have the power to accede to Oklahoma's request at this late date, and if convinced, which we are not, that we were clearly wrong in accepting jurisdiction of this case, we would not hesitate to depart from our prior rulings."

Id., 117 L.Ed. 2d at 17 (emphasis added).

Under Rule 54(b) as well as under the doctrine of law of the case, the District court here was free to reexamine its earlier decision regarding whether Fontroy stated a claim for inadequate security.

B. Fontroy's Second Amended Complaint Was Not A "New" Complaint, And He Was Put On Notice That The Inadequate Security Claim was Deficient When The Defendants Filed Their Motion For Summary Judgment. Petitioner Was Not Entitled To Any Further Leave To Amend.

Contrary to Petitioner's assertion, the District Court did not consider Fontroy's Second Amended Complaint as a "new" Complaint. (Petition for Certiorari p. 27). That is a fiction created by Petitioner. The District Court acknowledged that it had earlier denied Defendants' motion to dismiss the inadequate security claim asserted in Fontroy's Original and Amended Complaints. The Court also noted that "The earlier filings were on behalf of multiple unnamed plaintiffs. This order concerns plaintiff's second amended complaint, in which he is the sole plaintiff." (A-135-136; May 2, 1991 Order of O'Neill, J., n. 3). In point of fact, Fontroy's Second Amended Complaint was his third attempt to set out his claims. He had ample opportunity to amend his Complaint, and did so on several occasions. For these reasons, all of the cases cited by Petitioner to show that leave to amend should be liberally granted are irrelevant and inapplicable.

Furthermore, the District Court's decision to reexamine Fontroy's inadequate security claim was made after the Defendants had moved for Summary Judgment, and after Fontroy had responded to that motion. Defendants' motion stated: "Also fatal to plaintiff's claims are the absence of any facts in the Complaint or in discovery to suport [sic] the allegations that plaintiff actually suffered some measurable harm (physical and/or mental) as a result of inadequate security in the PCU." (A-91, memorandum of Law in Support of Defendants' Motion for Summary Judgment).

Under this Court's holdings in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), once Defendants moved for Summary Judgment,

Fontroy was required to "make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof." *Celotex*, 477 U.S. at 322. In the filing of Defendants' Motion for Summary Judgment, Fontroy was alerted to the deficiencies in his inadequate security claim. Fontroy failed to meet his burden under a Summary Judgment standard.

Petitioner never argued before the District Court, or before the Court of Appeals, that the allegations in the Second Amended Complaint were sufficient to state a claim. After four years of discovery, Fontroy never pointed to or presented any evidence that might establish his inadequate security claim. There were no probative exhibits or affidavits attached to the Response, and the Response designated no part of the record which might indicate culpability on the part of the Defendants. Petitioner merely asserted, incorrectly, as he does here, that the court was bound by the law of the case doctrine in deciding the inadequate security claim.

Petitioner misleads this court by repeatedly stating that the District Court twice upheld his inadequate security claim. (Petition for Certiorari, p. i, 24-25.) In making this claim, Petitioner construes the District Court's initial decision not to dismiss the inadequate security claim under 28 U.S.C. §1915(d) as the equivalent of a denial of a Rule 12(b)(6) motion. This is not correct. *See Neitzke v. Williams*, 490 U.S. 319, at 327-328 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." (citations omitted). 28 U.S.C. §1915(d) "accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless.")

Contrary to Petitioner's assertions, there was nothing unfair about the District Court's dismissal of the inadequate security claim. Defendants' Summary Judgment Motion effectively put Fontroy on notice that his claim was defective

because there was no evidence to support it. Fontroy responded with no evidentiary support for his claim. He neither argued that the claim for inadequate security stated a claim, nor supported that claim sufficiently to defeat the Motion for Summary Judgment, nor sought the opportunity to amend the complaint. In such a situation, the District Court clearly had the power to reexamine the inadequate security claim.

CONCLUSION

For all of the above reasons, Respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari which has been filed in this case.

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